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AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 924

Case No. 1012: ISHAK

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, First Vice-President, Presiding; Mr. Julio Barboza, Second Vice-President; Mr. Chittharanjan Felix Amerasinghe;

Whereas at the request of Nasr Ishak, a staff member of the United Nations High Commissioner for Refugees (hereinafter referred to as UNHCR), the President of the Tribunal, with the agreement of the Respondent, extended until 31 January 1998 the time-limit for the filing of an application with the Tribunal;

Whereas, on 29 January 1998, the Applicant filed an application that did not fulfil all the formal requirements of Article 7 of the Rules of the Tribunal;

Whereas, on 3 March 1998, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal to:

> "... quash the decision by the Secretary-General to accept the decision of the High Commissioner for Refugees to unilaterally impose a condition (to wit: that the promotion of the Applicant as recommended by the APPB [Appointments, Promotions and Postings Board] be suspended and delayed until the Applicant was assigned to another post at a higher level) upon the promotion of the Applicant despite the recommendation of the APPB that the Applicant be promoted without special condition, in due course.

Whereas the Respondent filed his answer on 1 November 1998;

Whereas the Respondent submitted additional documents on 9 February 1999 as an amendment to his answer;

Whereas the Applicant filed written observations on 30 June 1999;

Whereas, on 5 July 1999, the Tribunal ruled that no oral proceedings would be held in this case;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNHCR on 2 September 1984, on a one-year intermediate-term appointment, as Associate Programme Officer in Islamabad, Pakistan, at the L-2 level. On 2 March 1985, his functional title changed to Programme Officer. His contract was extended, and on 1 December 1987, he was reassigned as Head of UNHCR Sub-Office in Lahore, Pakistan. On 1 April 1988, the Applicant was reassigned as Project Officer, UNHCR Regional Bureau for South West Asia, North Africa and the Middle East (SWANAME), in Geneva. His intermediate-term appointment was converted to long-term status on 2 September 1989. On 1 July 1990, the Applicant was promoted to the L-3 level and his functional title was changed to Programme Officer. In August 1991, he was elected Chairperson of the UNHCR Staff Council in Geneva. On 2 September 1991, the Applicant's functional title was changed to Desk Officer. On 1 February 1992, the Applicant's functional title was changed to Chairperson, Staff Council, UNHCR Division of Human Resources Management (DHRM), Staff Welfare. On 1 July 1994, the Applicant's 200-Series appointment was converted to a 100-Series fixed-term appointment at the P-3 level. On 1 July 1995, the Applicant's post was converted from a fixed-term appointment to an indefinite appointment. On 23 October 1998, his functional title changed to Second Officer, and on 24 November 1998, he was temporarily reassigned to the Central Asia, South West Asia, North Africa, and the Middle East Operations Bureau.

On 30 September 1991, the Applicant, in his capacity as Chairperson of the Staff Council, wrote to the High Commissioner, confirming that the Staff Council had decided that the provisions of administrative instruction ST/AI/293 of 15 July 1982, should be implemented. That administrative instruction reads in relevant part:

> "10. The ... Chairman of the Executive Committee of each Staff Council ... shall, if he/she wishes, be released from assigned duties during his/her term of office, as follows:
>
> (a) Full-time release, if the number of staff members represented is 1,000 or more;
>
> ..."

Attached to the 30 September memorandum, was the Staff Council's proposals for the full-time release of the Chairperson of the Staff Council.

On 11 December 1991, the High Commissioner wrote a letter to UNHCR staff in the field, following an earlier address to UNHCR staff at Headquarters on the same subject, in which she indicated that she had "agreed on a temporary trial basis to release the Chairman of the Staff Council so that he can devote himself full time to staff matters." The Applicant was released full-time as of 1 February 1992.

On 31 May 1992, the Director, Regional Bureau for SWANAME, wrote to the Secretary of the Appointments, Promotions and Postings Board (APPB), recommending the Applicant for promotion to the P-4 level.

On 23 June 1992, the Applicant wrote to the Career Developme[illegible]fficer, asking that his "Rotation Exercise Form", submitted pursuant to UNHCR's rotation policy, be considered null and void. He noted that the Bureau of the Staff Council had instructed him not to avail himself of the current Rotation Exercise. He also explained that Staff Representatives had consulted the Assistant Secretary-General, Office of Human Resources Management (OHRM), United Nations, about the UN's policies regarding the release of Staff

Representatives, and that the Assistant Secretary General, OHRM, had said that "in all cases the Chairperson returns to his/her original post after completion of the term(s) of office ... that he would advise the High Commissioner accordingly and ... that UNHCR should not deviate from the practice of the UN."

On 11 January 1994, the Director, DHRM, wrote to the Applicant reminding him that his normal Standard Assignment Length (SAL) in Geneva expired in 1992 and that his next assignment should be in the field. While "realiz[ing] that [the Applicant] may choose to stand for re-election as Chairperson of the Staff Council, it [was] advisable that [the Applicant] study the Compendium and apply for posts in accordance with the instructions laid out therein ..." On 7 February 1994, the Applicant responded, noting that in the written proposals that the Staff Council submitted on 30 September 1991 to the High Commissioner at her request, the Staff Council proposed that the Chairperson, if not re-elected, would be expected to return to his/her prior post for a period not normally exceeding the balance of the SAL at the time of release. He further stated that he had had to withdraw his prior applications for posts because, in accordance with the Statutes of the UNHCR Staff Association, the resignation of the Staff Council's Chairperson requires the acceptance of the Staff Council.

On 10 February 1994, the Director, DHRM, wrote to the Applicant, stating that "the High Commissioner did not ... accept all of the [Staff Council's] proposals put to her." He noted that even if the procedures set out in the Staff Council's proposals were to be applied, the Applicant should still apply for vacancies in the current compendium exercise, since the Applicant had only two months to go before the expiry of his SAL prior to his full-time release. The Director added that "[t]his advice [was] given because DHRM [did] not wish to appear to be prejudging the outcome of the election of the Staff Council and its Chairman."

On 30 March 1994, the Applicant responded to the Director, DHRM, noting that the Applicant's re-election as Chairperson of the Staff Council rendered the issues raised in their previous correspondence moot. He went on to state his understanding of the post of Chairperson of the Staff Council, arguing in relevant part, as follows:

"...

> ... [T]he release of the Chairman on a full-time basis amounts to an internal secondment. As such, all rights and duties that derive from this situation and related to SAL, career development, etc. are preserved. With respect to the duration, it is often commensurate with that of the Mandate vested in the Chairman. What matters is, during this period, the Chairman is no longer subject to obligations and rules directly related to originally assigned duties such as SAL, Performance Review, etc.
>
> ... Welfare of the staff at large cannot be held hostage by the personal interests of the Chairman/staff member, who, for obvious reasons, may be induced in making undue concessions or acting to the detriment of the staff, while paving the way for the 'post Chairmanship' period.

..."

On 21 July 1994, the Deputy Director, DHRM, informed the Applicant that "following the recommendation of the APPB, the High Commissioner has promoted you to the L-4 level, subject to assignment to a post at that level." On the same date the Applicant wrote to the Secretary, APPB, asking for the "reason for non-granting of my promotion with effect from 1 July 1994", and asking for "copies of all written information submitted to the Board in the course of its review of [his] case."

On 26 July 1994, the First Vice Chairperson, APPB, wrote a memorandum to the Secretary, APPB, drawing attention to:

> "... an inadvertent error in respect to the recommendation for the promotion of ... the Chairman of the Staff Council. As you may recall, in considering his case the APPB was grateful to have the benefit of a clear written guidance from the Director of DHRM, through you, which is attached herewith for easy reference. Acting on the principles outlined, the board recommended promotion of [the Applicant] without any condition attached. The condition 'subject to assignment to a post at that level' was not part of the recommendation of the APPB."

On 10 August 1994, the Secretary, APPB, sent the Applicant a copy of the guidelines for the APPB when reviewing the possible promotion of the Chairperson of the Staff Council, and explained:

> "The aim behind the text ... was to try to treat each staff member in a neutral, fair and even handed manner. In his note, the Director had taken care to remove impediments that would normally have been obstacles to your promotion, i.e., the absence of a recommendation, the absence of a PER, and the absence of service on a post at the higher level ...
>
> Implementation of the Board's recommendations is, however, a separate issue and can be effected only when a person is actually occupying a post at the higher level. In your particular case, you have never occupied a post at the higher level. DHRM would have serious reservations about implementing the promotion of any staff member not yet occupying a post at the higher level, especially when other staff members have had to wait, in some cases for a year or more, simply because there was no post available at the higher level ..."

On 7 September 1994, the Applicant requested the High Commissioner to review the decision to impose a condition on the implementation of his promotion. On 21 September 1994, he requested the Secretary-General of the United Nations to review that decision. In the same letter, he requested permission for direct submission of the issue to the Administrative Tribunal. On 19 October 1994, the Assistant Secretary-General, OHRM, informed the Applicant that the Secretary-General had rejected this request because "[his] claim ... raise[d] issues of fact".

On 27 January 1995, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 23 April 1997. Its findings, conclusion and recommendation read as follows:

> "35. The Panel wishes to recall that appointment and promotion are ruled by staff regulations 4.1 to 4.6 and by staff rules 104.1 to 104.15. It is also to be pointed out that promotion is not a right for the staff member but falls under the discretion of the Secretary-General as set forth by the United Nations Administrative Tribunal (hereinafter UNAT) in its Judgement No. 275, Vassiliou (1981). Nevertheless, the

discretionary power of the Secretary-General is not an absolute one and the UNAT exercises control on this prerogative, as for example in Judgement No. 411, Al-Ali (1988), in which it was stated that 'staff members are promoted regularly according to an elaborate process governed by rules and procedures laid down in article 104.14 of the Staff Rules and related Secretariat issues. These rules and procedures while regulating the promotion process, also contain safeguards to ensure fairness and objectivity in a process which is vital to the life of a staff member'. The Panel was further guided in its consideration of the case by the UNHCR APPB Regulations of 12 October 1993.

36. In its thorough review of the case the Panel noted that, as stated by the Appellant, the High Commissioner had attached a condition to the Appellant's promotion, namely that it be subject to assignment to a post at the higher level, and that this condition was not part of the Board's recommendation. The Panel examined the contested administrative decision in the light of the Staff Rules and of paragraph 22 of the APPB Regulations under which it is stated that '[t]he effective date of promotions shall be 1 July of each year, unless the Board recommends and the High Commissioner approves another specified date, or qualifies the conditions for promotion'. The Panel thus noted that the High Commissioner did have the authority to subject a promotion to a specific condition.

37. Regarding a possible abuse of discretion, the Panel did not find in the file any element that could support such an allegation. Although there had been exceptions to the specified rules applying to promotion in UNHCR, the Panel finds that the Appellant was promoted in compliance with relevant Rules and Regulations. As the abuse of discretion has not been established and as the Appellant is free to continue his Staff Council activities, the Panel also believes that it cannot be argued that the contested administrative decision is an interference in the right of association.

Conclusion and recommendation

38. The Panel concluded that the High Commissioner's decision to implement the APPB's recommendation to promote the Appellant subject to assignment to a post at the higher level, was within her discretionary power and was not taken in violation of the relevant rules.

39. The Panel makes no recommendation in support of this appeal."

On 21 July 1997, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

"...

The Secretary-General has examined your case in the light of the Board's report. He has taken note of the Board's findings that the High Commissioner for Refugees did have the authority to subject your promotion to a specific condition; that no element was found to support any allegation of possible abuse of discretion; and that although there had been exceptions to the specific rules applying to promotion in UNHCR, you were promoted in compliance with relevant Rules and Regulations. He has also taken note of the Board's conviction that, as the abuse of discretion had not been established and as you are free to continue your Staff Council activities, it cannot be argued that the contested administrative decision is an interference [with] the right of association. Finally, the Secretary-General has taken note of the Board's unanimous conclusion that the High Commissioner's decision to implement the APPB's recommendation to promote you subject to assignment to a post at the higher level, was within her discretionary power and was not taken in violation of the relevant rules, and of the Board's determination to make no recommendation in support of [your] appeal. The Secretary-General has accordingly decided to accept this recommendation and to take no further action regarding your case.

..."

On 3 March 1998, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision of the High Commissioner to impose a condition upon the Applicant's promotion, above and beyond the recommendations of the APPB, is irregular and *ultra vires*.

2. The decision of the High Commissioner interferes directly and illegally with the right of association of the Applicant, and of other staff members who elected the Applicant as their Chairperson.

3. The decision of the High Commissioner was motivated solely by ill-will, malice and/or prejudice because its purpose was the removal of the Applicant as Chairperson

of the Staff Council, and therefore such decision constitutes a *détournement de pouvoir*.

Whereas the Respondent's principal contentions are:

1. Promotions are within the discretionary authority of the Respondent.

2. The Applicant's right of association was fully respected.

3. There was no evidence of arbitrariness, bias, discrimination, mistake of fact, or other extraneous factors.

The Tribunal, having deliberated from 7 to 29 July 1999, now pronounces the following judgement:

I. The Applicant served as Chairperson of UNHCR Staff Council in Geneva between 1991 and 1998. Since the position of Chairperson of the Staff Council is an ungraded post, the Applicant retained the L-3 level of his prior post during his tenure as Chairperson, Staff Council. On 18 July 1994, the APPB recommended the Applicant for promotion to the L-4 level. On 21 July 1994, the Deputy Director, DHRM, informed the Applicant that "following the recommendation of the APPB, the High Commissioner has promoted you to the L-4 level, subject to assignment to a post at that level." The Secretary of the APPB similarly advised the Applicant on 10 August 1994, that implementation of a recommendation of the APPB for promotion to a higher level depended on "occupying a post at the higher level." The Applicant appealed the administrative decision to impose a condition on his promotion, claiming, *inter alia*, that the decision violated administrative rules and practice and interfered with the staff members' rights of association.

II. The JAB recommended that no action be taken in his case, based on paragraph 22 of the APPB Regulations, which reads: "The effective date of promotions shall be 1 July each

year, unless the Board recommends and the High Commissioner approves another specified date, or qualifies the conditions for promotions."

III. The Tribunal notes that the APPB, as an advisory body, makes recommendations for promotion to the High Commissioner, UNHCR. These recommendations only concern the suitability of a staff member for promotion to a higher grade. However, the power to implement such recommendations, including the imposition of conditions for a promotion, rests with the High Commissioner. (See staff rule 104.14 (a), (f), (h)). The High Commissioner's power is, of course, limited by the guarantees that protect staff members from discrimination, lack of due process, arbitrariness, and extraneous motives. In Judgement No. 411, Al-Ali, paragraph III (1988), the Tribunal noted: "[S]taff members are promoted regularly according to an elaborate process governed by rules and procedures laid down in staff rule 104.14 and related secretariat issuances. These rules and procedures, while regulating the promotion process, also contain safeguards to ensure fairness and objectivity in a process which is vital to the life of a staff member."

IV. In this particular case, another important element to be taken into account is the Applicant's position as Chairman of the UNHCR Staff Council. The issue arises as to whether the condition imposed on the Applicant's promotion by the High Commissioner affects the freedom of association of both the Applicant and the staff members whom he represents. Point 4 of the Guidelines for Reviewing the Possible Promotion of the Chairman of the Staff Council states, inter alia, "since the grade of the 'post' of Chairman of the Staff Council is ungraded, the APPB cannot consider the grade of the 'post' as an impediment to the promotion of the Chairman."

V. However, the Secretary, APPB, in his letter dated 10 August 1994 to the Applicant, expressly distinguishes between the recommendation by the APPB and its implementation:

"Implementation of the Board's recommendation is, however, a separate issue and can be effected only when a person is actually occupying a post at the higher level. In your particular case, you have never occupied a post at the higher level. DHRM would have serious reservations about implementing the promotion of any staff member not yet occupying a post at the higher level, especially when other staff members have had to wait, in some cases for a year or more, simply because there was no post available at the higher level."

VI. In implementing the recommendation of the APPB, the High Commissioner had to bear in mind the peculiar feature of the post being occupied by the Chairman of the Staff Council, which is ungraded. The purpose of keeping the position of Chairman of the Staff Council ungraded is expressed in point 4 of the APPB Guidelines: "Staff must be able to elect anyone they wish as Chairman. Therefore, the 'post' of Staff Council Chairman should be ungraded. While it can be shown for budgetary purposes in the staffing table at the grade level of the incumbent, that grade level cannot be said to be the level of the functions".

VII. In general, the performance of functions at a higher level is a basic condition for implementing a recommendation for promotion to a higher level. As long as the Applicant remained in his "post" as Chairman of the Staff Council, he could not fulfil that condition. The position taken by the High Commissioner seems, then, reasonable.

VIII. The Applicant argues that the decision to impose a condition on his promotion interferes with the freedom of association and prevents staff members from being represented by the Chairman of their choice. It is true that freedom of association is a highly important interest, for both the staff and the Administration, and it must be protected against abuses of power by the authorities. (Cf. Judgements No. 15, Robinson (1952; and No. 679, Fagan (1994). But it is also true that the coexistence of freedom of association and good administration of the organisation must be reasonably balanced. Exceptions must be made in

favour of the staff association, and they have been made as implied by the APPB Guidelines: staff members may elect colleagues of any grade as chairperson, the chairperson of the association must not suffer any adverse consequence for his or her functions in defence of the interests of the staff. In particular his or her career must not be negatively affected. Freedom of association must be protected, but within the limits of reason. The Tribunal finds that the Guidelines referred to above provide a fair and reasonable framework for reconciling the interests of both the staff association and the Administration. The decision by the High Commissioner to impose a condition on the Applicant's promotion does not interfere with the freedom of association or violate the administrative rules and practices, as alleged by the Applicant.

IX. For the above reasons, the Tribunal rejects the application in its entirety.

(Signatures)

Mayer GABAY
First Vice-President, presiding

Julio BARBOZA
Second Vice-President

Chitharanjan Felix AMERASINGHE
Member

Geneva, 29 July 1999

Maritza STRUYVENBERG
Executive Secretary